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**To:** South Carolina Sentencing Guidelines Commission

**Subject:** Criminal Justice Sentencing Policy Trends: 2001-2009

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The last decade has spawned a number of sentencing reforms, as state legislatures and executives across the country attempt to reconcile rising incarceration rates and increasing corrections spending with shrinking budget resources. The population of state prisons in the United States has increased steadily over the last two decades, rising 317 percent between 1980 and 2005.<sup>1</sup> Correctional spending at all levels of government has grown even faster jumping from just \$7 billion in 1980 to nearly \$61 billion in 2003.<sup>2</sup> In the face of rising incarceration rates and escalating costs, states have been exploring new sentencing strategies that can keep costs down while still protecting public safety.

This memorandum provides a summary of sentencing legislation that has been passed within the last ten years. It is not an exhaustive list, rather it is intended to highlight key legislation exemplifying recent sentencing policy trends. The most widely adopted statutes fall within the following six categories:

- I. Redefining Criminal Offenses**
- II. Reclassifying Criminal Offenses**
- III. Expanding Community Corrections**
- IV. Expanding / Mandating Drug Treatment**
- V. Relaxing Mandatory Minimum Sentences / Reducing Sentence Lengths**

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<sup>1</sup> *Recent National Trends in Sentencing and Corrections*, Nevada Legislative Commission's Subcommittee to Study Sentencing and Pardons and Parole and Probation. (2006) (testimony of Dan Wilhelm, Vera Institute of Justice).

<sup>2</sup> Wilhelm, 2006.

## **VI. Establishing Sentencing Information Systems & Guidelines**

### **I. REDEFINING CRIMINAL OFFENSES**

Despite the political challenges, several states have passed legislation modifying criminal offense definitions in a manner that impacts sentence lengths. Legislation resulting in sentence-length reduction has generally been limited to non-violent, low-level felonies. Examples are provided below:

- A. Alabama: Raised Felony Theft Threshold Dollar Amount (HB 491/SB 348, 2003)
  - Legislature enacted the Alabama Sentencing Commission's recommendation to raise the class C felony theft threshold from \$250 to \$500 and class B to \$2,500; the Alabama Sentencing Commission projected that the change would save 3,000 prison beds over a five-year period.
- B. Ohio: Plan to Raise Felony Theft Threshold Dollar Amount
  - In Ohio's Executive Budget FY 2009-2010, Governor Strickland recommended an increase in felony theft thresholds from \$500 to \$730. This sentencing modification is projected to save the state \$1,294,290 annually.
- C. Massachusetts: Decriminalization of Marijuana (Ballot Question 2, 2009)
  - Reduced Possession of one ounce or less of marijuana to a civil infraction carrying \$100 fine; conviction not recorded in Criminal Offender Record Information Report.
- D. Indiana: Affirmative Defense to "Drug-Free" Zone Law (HB 1892, 2001)
  - Established an affirmative defense to defendants charged with possessing or selling drugs within a "drug-free" zone – requires the defendant to assert he/she was only briefly within the drug-free zone or was lured there by police.

## II. RECLASSIFYING CRIMINAL OFFENSES

During the last ten years, several states have reconsidered or modified offense classifications. In some states, this has resulted in the creation of new offense classes, while in others it has resulted in the reduction of the classification level of certain offenses. Examples are provided below:

- A. Arkansas: Drug Paraphernalia Reclassification (HB 2313, 2001)
  - Reduced penalty for possession, use or distribution of drug paraphernalia (such as syringes) from a class C felony to a class A misdemeanor.
- B. Illinois: Revision of Criminal Code (SB 1300, 1325, 100, 2009)
  - Legislature adopted first set of CLEAR Commission's revisions to Criminal Code and Code of Corrections, which streamlines and reorganizes the criminal and corrections law:
    - (a) Criminal Act and Mental State, Kidnapping, and Second Degree Murder (SB 1300);
    - (b) Forfeiture (SB 1325).
- C. Iowa: Reduction of Burglary Offense (Senate File 543, 2001)
  - Downgraded burglary offenses involving cars and boats by creating new class D felony and aggravated misdemeanor (attempt).
- D. Colorado: Reclassification of Drug Possession (SB 318, 2003)
  - For first offenders, reclassified possession of less than a gram of schedule I or II drugs to class 6 (lowest felony class);
  - For repeat offenders, downgraded possession of less than a gram of schedule I or II drugs from class 2 to class 4.

### III. EXPANDING COMMUNITY CORRECTIONS

During the last decade, legislatures in a number of states have attempted to address offenders' high recidivism rates by investing heavily in rehabilitative treatment, transitional services and enhanced supervision. As a result, there has been a substantial amount of legislation focused on developing capacity to provide a variety of services and community punishments. Examples are provided below:

- A. Illinois: Mental Health Court Treatment Act (730 ILCS 168/SB 677, 2007)
  - Establishes parameters for the creation of mental health court programs within the state. Requires the prosecutor, defendant and court officials to agree to a potential participant's participation in the mental health court program (excludes most violent offenses);
  - Incorporates graduated requirements, such as individual or group therapy, medication, drug testing and education and vocational training, into the program; also utilizes incentives and sanctions (fines, court fees, restitution, jail time, etc.).
- B. Kansas: Investment in EBP and Strategic Planning in Community Corrections (SB 14, 2007)
  - Legislation creates grant program awarding funds to counties with strategic plans that set performance goal of reducing revocations by 20 percent from 2006. State deploys trainings in case management, motivational interviewing, etc. and reviews strategic plan for incorporation of EBP.
- C. Alabama: Piloting EBP and Strategic Planning in Community Corrections (2008)
  - Alabama's Cooperative Community Alternative Sentencing Project is a pilot project incorporating EBP and strategic planning in community supervision, including implementation of the Ohio risk needs assessment tool.
- D. Indiana: Road to Recovery Initiative (2006)
  - Convenes over a dozen governmental and community organizations to provide reentry support including substance-abuse programs, life skills training and county reentry courts that manage community supervision and monitor community corrections.
- E. Arizona: Shift toward EBP in Probation (SB 1476, 2008)
  - Provides incentive for probation departments to employ best practices to reduce recidivism and technical violation rates of probationers by awarding successful counties with a percentage of the resultant cost-savings.
- F. Maryland: Proactive Community Supervision Reform (2002)
  - A parole supervision reform program that employs research-based behavioral management strategies to encourage pro-social behaviors. Supervisees work with officers to identify positive goals and develop a case plan focused on building positive behavioral strategies to achieve those goals.
- G. Texas: Reentry Transition Centers (Justice Reinvestment Legislation, 2007)
  - Re-invested \$241 million to expand residential treatment and reentry programs:

1. **Residential:** 800 beds for probationers with substance abuse needs; 1,400 beds for probation/parole technical violators; 300 beds in halfway houses for parole reentry; 500 beds for in-prison treatment targeting DWI offenders; 1,200 slots for intensive substance abuse treatment in state jail system; and
2. **Outpatient:** 3,000 slots for outpatient substance abuse treatment for probationers.

H. Georgia: State Structure for Reentry Initiatives (GRIP, SVORI - 2004)

- Georgia has developed a three-tier system for implementing Reentry Initiatives:
  1. **Steering Committee** - comprised of state leaders from the Governor's Office, the Council of Superior Court Judges, Criminal Justice Coordinating Council, DOC, Community Affairs, Education, Human Resources, and Labor, Technical and Adult Organizations – this Committee provides project oversight and direction;
  2. **Policy Team** - comprised of second tier leadership (deputy directors, division directors, etc.) and conducts research on best practices in reentry;
  3. **Local Implementation Pilot (SVORI)**.
- Reentry Impact Project (GRIP, 2004) is supported by the National Institute of Corrections (NIC) Transition from Prison to the Community (TPC) Initiative. In 2005, the Policy Team developed three core and 27 specific recommendations on reentry which were approved by the Steering Committee. The Policy Team has been re-formed into an Implementation Oversight Team and is responsible for implementing the recommendations. The three core recommendations are:
  - Develop and implement an automated risk and needs assessment instrument (COMPAS);
  - Develop a transition accountability plan (reentry plan);
  - Create efficient interagency electronic communication – single offender database accessible to all relevant agencies.
- Serious and Violent Offender Reentry Initiative (SVORI, 2004) is one of 69 grantees of the Serious and Violent Offender Reentry Initiative (SVORI) established by the US Departments of Justice, Labor, Housing and Urban Development, and Health and Human Services.
  - SVORI's adult pilot sites are located in Augusta, Macon, and Savannah. The program has three phases: (1) Prison: specific, targeted services and reentry planning; (2) Transition Center: 6-9 months; (3) Probation/Parole Community;
  - There are 1,929 transitional beds statewide, and offenders are referred by State Board of Pardon and Parole Staff or prison staff based on behavior in prison, criminal history, etc. The transitional centers provide "work release" opportunities – they are residential facilities and provide intensive services. Offenders are responsible for room and board, restitution, fines, child support, etc.

I. Washington D.C.: Reentry and Sanctions Center (2006)

- Designed for people that violate the terms of pre-trial release, probation, parole and supervised release;

- Provides immediate placement, assessment and stabilization of non-compliant offenders, typically for repeated substance abuse violations.

J. Arkansas: Omega Technical Violator Program (2005)

- A 60 - 90 day residential treatment facility for probation and parole violators who would otherwise be sent to jail or prison; a 300-bed male facility.

#### **IV. EXPANDING / MANDATING DRUG TREATMENT**

Substance abuse treatment and drug courts have gained significant attention within the last ten years. Anticipating cost-savings from additional prison diversions, many legislatures invested substantial funding to ensure the availability of substance abuse treatment. A few states have enacted mandatory drug treatment statutes requiring offenders convicted of low-level drug crimes to receive treatment sentences. Examples are provided below:

- A. Kansas: Mandatory Drug Treatment (SB 123, 2003)
  - Mandatory, community-based drug treatment in lieu of incarceration for non-violent drug possessors with no prior felony convictions for person crimes or drug trafficking;
  - Up to 18 months of mandatory drug treatment and probation supervision;
  - Technical violations subject to non-prison sanctions rather than program discharge or prison revocation;
  - Risk Needs Assessment and treatment providers certified by DOC after sentencing;
  - The Kansas Sentencing Commission estimated that 1,439 people per year would be diverted to mandatory treatment, roughly 475 of who would have gone to prison absent the legislation.
- B. California: Mandatory Drug Treatment (Proposition 36, 2000)
  - First- and second-time nonviolent, drug possession offenders receive substance abuse treatment instead of incarceration;
  - The measure was projected to divert over 30,000 drug offenders per year to treatment, saving taxpayers \$250 million in prison costs annually.
- C. Arizona: Mandatory Drug Treatment (Proposition 200, 1996)
  - Mandatory drug treatment instead of jail time for first- and second-time drug possession offenders;
  - Offenders incarcerated for possession offenses prior to bill passage became eligible for parole;
  - Established the Drug Treatment and Education Fund supported with monies from a percentage of the luxury tax on alcohol, cigarettes and other tobacco products.
- D. Hawaii: Mandatory Drug Treatment (SB 1188, 2002)
  - Modeled after Arizona and California;
  - Mandatory treatment and probation instead of prison for first-time, non-violent offenders convicted for drug possession or use;
  - Mandated diversion to treatment also applies to probation and parole violators, if their first violation involves possession or use of drugs.
- E. New Jersey: Drug Court Expansion (SB S-233/504, 2008)
  - Expanded eligibility criteria to include persons with two or more previous third-degree felony convictions, subject to a prosecutor's veto;
  - Replaced a six-month inpatient treatment requirement with judicial discretion to determine type of placement (inpatient or non-residential);

- Allowed for early release from five-years of special probation if the person makes exemplary progress, has completed treatment, served at least two years of probation, has not committed a substantial violation of the term of probation, and is unlikely to commit an offense if supervision ceases.



**V. RELAXING MANDATORY MINIMUM SENTENCES/ REDUCING SENTENCE LENGTHS**

The reform of mandatory minimum drug sentencing laws has been an active area of legislation. In addition to repealing or revising their mandatory minimum sentencing laws, many state legislatures have also reduced sentence lengths for drug crimes.

**A. New York: Rockefeller Drug Law Reform (2009)**

- Eliminated mandatory minimums and restored judicial discretion in low-level drug cases. Prison no longer mandatory for:
  - First time non-violent Class B, C, D and E felonies;
  - Second time non-violent Class C, D, and E felonies;
  - Second time non-violent Class B felonies deemed by a drug treatment counselor as being drug dependent or having abused drugs or alcohol.
- Reduced minimum penalty for Class B felonies from 3 ½ years to 2 years;
- Seals record for drug and some non-drug, non-violent offenses upon successful completion of ATI/treatment;
- Expanding drug treatment and alternatives to incarceration through \$71 million investment;
- Retroactive re-sentencing for approximately 1,500 currently incarcerated offenders (judicial discretion) according to new sentencing changes’
- Mandatory Minimums still exist for high-level drug felonies:
  - Second-time Class B felonies if defendant was convicted of, or had pending, a *violent felony* in the previous 10 years;
  - Class A-I and A-II felonies (added A-I felony “kingpin” provision: 15 to life; added B felony selling to minor under 17).

**B. Michigan: Mandatory Minimum Repeal (P.A. 665,666,670, 2002)**

- Eliminated most mandatory minimum drug laws, folding sentencing of drug offenders into the guidelines system:
  - Eliminated mandatory consecutive sentences on multiple charges;
  - Replaced lifetime probation for lowest-level drug offenses with five years of probation;
  - Revised drug weight thresholds; weight no longer determinative of sentence, but is instead a sentencing factor subject to downward departure;
  - Allowed early parole release.
- Impact:
  - Approximately 1,200 Michigan prisoners sentenced under the old mandatory minimum laws immediately eligible for earlier parole consideration;
  - Approximately 7,000 low-level drug offenders eligible for discharge from lifetime probation once they serve the standard term of five years;
  - Saved the state \$41 million in 2003.

**C. Delaware: Mandatory Minimum Reform (HB210, 2003)**

- Decreased mandatory minimum sentences for drug trafficking offenses;
- Doubled quantity threshold for drug trafficking to 10 grams;

- Made convicted drug traffickers eligible for transitional community programs during last 180 days of prison term;
  - Eliminated 15-year mandatory minimum prison term for second-offense selling or possession with intent to sell.
- D. Indiana: Mandatory Minimum Reform (HB 1892, SB 358, 2001)
- Eliminated mandatory minimums for certain non-violent drug offenses and granted judges discretion to sentence offenders to home detention or work release; retroactive. Also granted judges discretion to divert drug offenders selling to support habit (HB 1892);
  - Exempted drug offenders with no other types of convictions from “three strikes” law, unless they possessed more than one trafficking conviction (SB 358).
- E. Wisconsin: Recidivism Risk Reduction Incentive (2009)
- Granted judges the option to sentence offenders to an early “risk reduction” release date conditioned on the successful completion of required prison programs while the offender is incarcerated; required prison programs are determined by WDOC after intake assessment.
- F. Pennsylvania: Recidivism Risk Reduction Incentive (Act 81, 2008)
- Granted judges the option to sentence offenders to an early “risk reduction” release date conditioned on successful completion of prison programs.
- G. Washington: Implements Special Drug Sentencing Grid (2002)
- Drug offenders subject to treatment-oriented drug grid; extended drug court sentences to most drug offenders;
  - Prison cost-savings deposited to a Criminal Justice Treatment Account for court-supervised treatment and other services.
- H. Kansas: Modified the Sentencing Guidelines Sentencing Options (2000)
- Broadened target ranges for community corrections under sentencing guidelines and reduced length of community supervision time by half in many low-level offenses, resulting in the immediate discharge of 574 prisoners (saving 800 prison beds for serious offenders).

## **VI. ESTABLISHING SENTENCING INFORMATION SYSTEMS & GUIDELINES**

Legislatures have supported policies expanding states' capacity to acquire criminal justice data that can be used to inform policy decisions. The last ten years has seen a proliferation of legislation establishing new commissions and broadening their scope from drafting sentencing guidelines drafting to larger criminal statistics research.

### **A. Missouri: Automated Recommended Sentencing System (2005)**

- The Missouri Sentencing Advisory Commission developed an automated web-based application to assist judges, prosecutors and defendants in determining possible guidelines for a recommended sentence. The program calculates a recommended sentence range based on the charged offense and criminal history.

### **B. North Carolina: Sentencing Information System**

- Developed a computerized corrections population simulation model to project the resources needed to implement policy changes and recommendations;
- Database also contains profile information on offenders (e.g., criminal history, sentences, time expected to serve, and other characteristics) that will enable the Commission to draw conclusions about policy impact;
- FL, PA, TX, KS have similar models.

### **C. Iowa: Minority Impact Statement Bills (House File 2393, 2007)**

- Requires that an impact statement be attached to any bill, joint resolution or amendment that proposes a change in public offenses, penalties or sentencing, or parole or probation procedures. The impact statement must include: (1) the estimated number of cases that will be impacted annually (2) the fiscal impact, (3) the impact of the legislation on minorities, and (4) the impact on institution and community-based facilities, etc.;
- The legislature also requires a minority impact statement for grant applications from agencies, indicating: (1) the impact on minority communities (2) the rationale for the impact (3) and evidence of consultation with minority representatives if the program has a disproportionate impact;
- Connecticut passed similar bill requiring Racial Impact Statements (HB 5933, 2008).

### **D. Alabama: Voluntary Standards and Worksheets (SB 167/231, 2006)**

- Developed to promote fairness and consistency in sentencing; the sentencing worksheet formula balances a variety of factors, including prior criminal history and current offense charge.

### **E. Tennessee: Criminal Sentencing Reform Act of 2005 (2005)**

- Task Force on the Use of Enhancement Factors in Criminal Sentencing was created and charged with drafting the state's sentencing guidelines. Tennessee's guidelines rely on five felony classes and five defendant type categories to calculate presumptive sentencing ranges.

### **F. Illinois: Sentencing Policy Advisory Council (SPAC, SB 132, 2009)**

- Established SPAC, a neutral body charged with examining sentencing policies and practices with the goal of increasing proportionality, promoting rehabilitation and controlling state spending on corrections;
- Duties include collecting and analyzing data on the correctional system, identifying crime trends, projecting inmate population growth, and examining the effect of new penalty enhancements and other sentencing practices. SPAC does not call for the development of sentencing guidelines.